No. 81-55

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

BRIEF AND APPENDICES FOR PETITIONER

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Petitioner
One Hogan Place
New York, New York 10013
(212) 553-9310

ROBERT M. PITLER
MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

Question Presented

To prevent the abuse of children who are made to engage in sexual conduct, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of non-obscene material which shows children engaged in such conduct?

The New York State Court of Appeals answered this question in the negative.

TABLE OF CONTENTS

	PAGE
Question Presented	1
Table of Authorities	v
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
The Judgment Below	4
Summary of Argument	7
Point—New York's prohibition of the dissemination of non-obscene materials showing the sexual conduct of children furthers the State's compelling interest in protecting children from sexual abuse, in a manner no more restrictive of speech than is necessary to further that interest	9
Introduction	9
(A) The prohibition against using children by having them engage in sexual conduct before a camera or live audience is fully justified by the compelling state interest in protecting children	11
(B) A statute banning the dissemination of material depicting the unlawful sexual use of a child is justified fully by the compelling state interest in protecting children and the absence of any less restrictive alternative	15

PAGE

(C) Section 263.15 is not underinclusive because there was good reason to prohibit the dissemination of materials depicting the sexual abuse of children without also prohibiting dissemination of materials depicting other conduct harmful to children 27

(D) Prohibiting the dissemination of materials depicting sexual conduct by children regardless of where that conduct occurs is well within the state's police power 29

Conclusion 33

TABLE OF AUTHORITIES

PAGE

Cases:

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 26

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1951) 30

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 27, 29

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 11, 12, 16

Ginsberg v. New York, 390 U.S. 629 (1968) 11, 15, 16

Matter of Shields v. Gross, —— M.2d ——, —— N.Y.S. 2d ——, N.Y. Law Journal, Nov. 16, 1981, p. 13 col. 1 (Sup. Ct., N.Y. Co., 1981) 13a

Miller v. California, 413 U.S. 15 (1973) 11, 12, 22

Nebbia v. New York, 291 U.S. 502 (1934) 30

Nettleton Co. v. Diamond, 27 N.Y. 2d 182, 264 N.E. 2d 118, 315 N.Y.S. 2d 625 (1970), *app. dism'd for want of substantial Federal question, sub nom.* Reptile Products Assn., Inc. v. Diamond, 401 U.S. 969 (1971) 32

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 18

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 12, 14a

People v. Byrnes, 33 N.Y. 2d 343 (1974) 8a

People v. Ferber, 96 Misc. 2d 669 (S. Ct., N.Y. Co., 1978), *aff'd without op.*, 74 A.D.2d 558 (1st Dept. 1980), *rev'd*, 52 N.Y. 2d 674 (1981) 2, 3, 4

People v. Folk, 109 Misc. 2d 738, 440 N.Y.S. 2d 984 (Sup. Ct. N.Y. Co. 1981) 11

PAGE

People v. Kahan, 15 N.Y. 2d 311, 206 N.E. 2d 333, 258 N.Y.S. 2d 391 (1965) 11
People v. New Horizons, Inc., —— Colo. ——, 616 P.2d 106 (Colo. Sup. Ct. 1980) 22
People v. Stabile, 58 Misc. 2d 905, 296 N.Y.S. 2d 815 (N.Y.C. Crim. Ct. 1969) 21
Prince v. Massachusetts, 321 U.S. 158 (1944) 11

Schad v. Borough of Mount Ephraim, —— U.S. ——, 101 S.Ct. 2176 (1981) 16
Schneider v. State, 308 U.S. 147 (1939) 16
State v. Shingaki, Hawaii Circuit Court, First Circuit, Cr. No. 54385, April 27, 1981 13

Time v. Hill, 385 U.S. 374 (1967) 26

United States v. Darby, 312 U.S. 100 (1941) 17, 18
United States v. New York Telephone Co., 434 U.S. 159 (1977) 29
United States v. O'Brien, 391 U.S. 367 (1968) 11, 12
United States v. Various Articles of Obscene Merchandise, 600 F.2d 394 (2d Cir. 1979) 21

Young v. American Mini Theatres, 427 U.S. 50 (1976) 16

Constitutional Provisions:

United States Constitution, First Amendment 3, 4, 5, 7, 8, 16, 26, 29

Statutes:

N.Y. Educational Law §3231-a 28
N.Y. General Business Law §69-a 31
N.Y. Labor Law §133 28
N.Y. Penal Law §235.00(1)(c) 22
N.Y. Penal Law Article 263 12

PAGE

N.Y. Penal Law §263.00 ..... 9, 14, 24
N.Y. Penal Law §263.05 ..... 9, 11, 12
N.Y. Penal Law §263.10 ..... 3, 4, 9, 20, 21
N.Y. Penal Law §263.15 ..... 1, 3, 4, 6, 9, 10, 19, 22, 25, 26, 27, 29
18 U.S.C. §§2251-2253 13
28 U.S.C. §1257(3) 2
Ala. Code §§13-7-231, 13-7-232 13
Alaska Stat. §11.41.455 13
Ariz. Rev. Stat. Ann. §13-3553 13
Ark. Stat. Ann. §41-4201 13
Cal. Penal Code §311.2(b) (Deering) 13
Colo. Rev. Stat. §18-6-403(3)(b) 13
Conn. Gen. Stat. Ann. §53a-196b (West) 13
Del. Code Ann. tit. 11, §§1108, 1109 13
Fla. Stat. Ann. §847.014(2)(b) (West) 13
Ga. Code Ann. §26-9943(a) 13
Hawaii Rev. Stat. §707-751 13
Ill. Ann. Stat. ch. 38 §11-20a(b)(1) (Smith-Hurd) 13
Ind. Code Ann. §35-30-10.1-2 13
Iowa Code Ann. §728.12 (West) 13
Kan. Stat. Ann. §21-3516 13
Ky. Rev. Stat. §§531.320, 531.340-531.360 13
La. Rev. Stat. Ann. §14:81.1(A)(3) 13
Me. Rev. Stat. Ann. tit. 17, §2923(1) 13
Md. Crim. Law Code Am. §419A 13
Mass. Ann. Laws ch. 272, §29A 13
Mich. Comp. Laws Ann. §750.145c(3) 13
Minn. Stat. Ann. §617.246(3) and (4) 13
Miss. Code Ann. §97-5-33(4) 13
Mo. Ann. Stat. §568.060(1)(b) 13
Mont. Rev. Codes Ann. §45-5-625 13
Neb. Rev. Stat. §28-1463(2) 13
Nev. Rev. Stat. §200.509 13
N.H. Rev. Stat. Ann. §650:2(II) 13
N.J. Stat. Ann. §2C:24-4(b)(5) 13
N.M. Stat. Ann. §30-6-1 13

PAGE

N.C. Gen. Stat. §14-190.6 13
N.D. Cent. Code Ann. §12.1-27.1-03(2) 13
Ohio Rev. Code Ann. §2907.321(A) (Anderson) 13
Okla. Stat. Ann. tit. 21, §1021.2 13
Ore. Rev. Stat. §163.485 13
Pa. Cons. Stat. Ann. §6312(c) 13
R.I. Gen. Laws §11-9-1.1 13
S.C. Code §16-15-380 13
S.D. Codified Laws Ann. §22-22-24 13
Tenn. Code Ann. §39-1020 13
Tex. Penal Code Ann. tit. 9, §43.25(e)(Vernon) 13
Utah Code Ann. §76-10-1206.5 13
Va. Code §18.2-374.1(B)(4) and (5) 13
Wash. Rev. Code Ann. §9.68A.030 13
W.Va. Code §61-8C-3 13
Wis. Stat. Ann. §940.203(4)(West) 13
Wyo. Stat. Ann. §14-3-102(a)(v)(E) 13

Other Authorities:

T. Abel-Peterson, Children of the Evening (1981) 7a, 10a, 11a

Anson, *The Last Porno Show*, 8 New Times 46 (1977), *reprinted in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 150-58 ..... 5a, 6a, 10a, 11a

Attorney General's Advisory Committee on Obscenity and Pornography, Report to the Attorney General on Child Pornography in California (1977) 30, 4a

Baker, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L. Rev. 809 (1978) 5a

PAGE

Benward and Densen-Gerber, *Incest As a Causative Factor in Anti-Social Behavior: An Exploratory Study*, 4 Contemp. Drug Prob. 322 (1975) 13a

Blumberg, *Child Sexual Abuse: Ultimate in Maltreatment Syndrome*, 78 New York State Journal of Medicine, pp. 612-16 (1978) 9a, 10a

D. Bracey, "Baby-Pros": Preliminary Profiles of Juvenile Prostitutes (1979) 11a

Brooke and Teri, Us, January 19, 1982, p. 69 ..... 25, 13a

Burgess, Groth and McCausland, *Child Sex Initiation Rings*, 51 Am. J. Orthopsych. 110 (1981) ... 5a, 10a 11a

Burgess and Holmstrom, *Sexual Trauma of Children and Adolescents: Pressure, Sex and Secrecy, reprinted in* L. Schultz, The Sexual Victimology of Youth, pp. 67-82 (1980) 9a, 10a

Campbell, *Help Sought for Children Used in Pornography, New York Times*, Jan. 14, 1977, Pt. II, p. 3, col. 1 ..... 6a

Chervenak, *Selected Bibliography on Pornography and Violence*, 40 U. Pittsburgh L. R. 652 (1979) ... 14a

Child's Garden of Perversity, Time, April 4, 1977, p. 55, *reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) pp. 423-24 ..... 5a, 11a

Child Pornography: Outrage Starts to Stir Some Action, U.S. News and World Report, June 13, 1977, p. 66 ..... 5a

Clifford, series of articles on child prostitution and pornography, *The Jackson (Mississippi) Daily News*, August 24-28, 1980 ..... 4a

PAGE

Cook, *The X-Rated Economy*, Forbes, vol. 122 no. 6, Sept. 18, 1978, p. 81 ..... 6a, 7a

Court, *Pornography and Sex Crimes: A Re-evaluation in Light of Recent Trends Around the World*, 5 International Journal of Criminology and Penology 129 (1976) 14a

Ditkoff, *Child Pornography*, American Humane, April 1978, pp. 29-32 ..... 5a

Dudar, *America Discovers Child Pornography*, Ms., August 1977, p. 45 ..... 5a, 6a

D. Finkelhor, Sexually Victimized Children (1979) 10a 12a

Finkelhor, *What's Wrong With Sex Between Adults and Children?* 49 Am. J. Orthopsych. 692 (1974) 9a

Gaylin, *The Prickly Problems of Pornography*, 77 Yale L.J. 579 (1968) 10a

R. Geiser, Hidden Victims: The Sexual Abuse of Children (1979) 5a

Goldstein, *Kids Do the Darndest Things, The Village Voice*, September 24-30, 1980, p. 36 col. 1 25

Guio, Burgess and Kelly, *Child Victimization: Pornography and Prostitution*, 3 J. of Crime and Justice 65 (1980) 5a, 10a

Interim Report of Texas House Select Committee on Child Pornography: Its Related Causes and Control (1978) 4a, 8a

Ivins, *Eight Held As Principles in Smut Production, New York Times*, April 27, 1977, p. 1, col. 6 ..... 7a

James and Meyerding, *Early Sexual Experience As a Factor in Prostitution*, 7 Archives of Sexual Behavior 31 (1978) 12a

PAGE

S. Janus, The Death of Innocence (1981) 11a

R. Kempe and C. Kempe, Child Abuse (1978) 12a

Kiddie Porn, 60 Minutes, vol. IX, no. 33, May 15, 1977, *reprinted in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 123-30 ..... 5a

King, *Chicago Jury to Probe Pornography and Prostitution Involving Boys, New York Times*, May 23, 1977, p. 19 col. 2 30

Koestler, *Runaway Teenagers*, Public Affairs Pamphlet No. 552 (1981) 10a

Lewis and Sarrel, *Some Psychological Aspects of Seduction, Incest and Rape in Childhood*, 8 J. Am. Acad. Child Psych. 606 (1969) 12a

C. Linedecker, Children in Chains (1981) 19, 30, 5a, 6a, 7a, 8a, 10a, 13a, 14a

R. Lloyd, For Money or Love: Boy Prostitution in America (1976) 5a, 8a

Loggins and Branscome, *Boys Farm Scandal: People in Rural Tennessee County 'Just Didn't Know' What Went On, Washington Post*, June 5, 1977, *reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 442-43 ..... 8a

L. Lovelace, Ordeal (1980) 13a

K. Meiselman, Incest: A Psychological Study of Causes and Effects with Treatment Recommendations (1978) 13a

PAGE

Obscenity and the Use of Minors in Pornographic Material, Hearings Before the California Assembly Committee on Criminal Justice (1977) 4a

Pope, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 Ill. L.F. 711 23

Project, *An Empirical Inquiry into the Effects of Miller* v. *California on the Control of Obscenity,* 52 N.Y.U.L. Rev. 810 (1977) 20, 22

Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 4a, 5a, 7a, 8a, 11a, 14a

Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 Mich. J.L. Reform 295 (1979) 17

F. Rush, The Best Kept Secret: Sexual Abuse of Children (1980) 5a

Schoettle, *Child Exploitation: A Study of Child Pornography,* 19 J. Am. Acad. Child Psych. 289 (1980) 5a, 11a, 12a

Sex and Violence: Pornography Hurts, 118 Science News 166 (1980) 14a

Sexual Exploitation of Children, A Report to the Illinois General Assembly by the Illinois Legislative Investigating Commission (1977) 30, 4a, 8a

Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 19, 30, 4a, 5a, 6a, 8a, 10a, 11a, 13a, 14a

PAGE

Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) 19, 30, 4a, 6a, 7a, 8a, 10a, 12a

Sgroi, *Comprehensive Examination for Child Sexual Assault: Diagnostic, Therapeutic and Child Protection Issues, reprinted in* Burgess, Groth, Holmstrom and Sgroi, Sexual Assault of Children and Adolescents, pp. 143-57 (1978) 9a

Shea, *Kids in Pornography,* Playboy, vol. 24 no. 8, p. 54 (1977) 20

Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act,* 17 Wake Forest L.R. 535 (1981) 13

Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale* and other articles, *Chicago Tribune,* May 15-17, 1977, *reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 428-42, *and in* Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 130-50 ..... 30, 4a, 8a

Stoller, *Centerfold: An Essay on Excitement,* 36 Arch. Gen. Psych. 1019 (1979) 11a

Summit and Kyrso, *Sexual Abuse of Children: A Clinical Spectrum,* 48 Am. J. Orthopsych. 237 (1978) 12a, 13a

The New York Daily News, December 12, 1980, p. 9 col. 2 25

PAGE

The New York Times, June 15, 1980, Section 2, p. 25 col. 2 25

Tribe, American Constitutional Law (1978) 16, 17, 20

Weeks, *The Sexually Exploited Child*, 69 So. Med. J. 848 (1976) 10a

Wright, series of articles on child pornography in *Traverse City Record-Eagle reprinted in* Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977), pp. 82-88 8a

No. 81-55

IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Writ of Certiorari to the New York State Court of Appeals

BRIEF FOR PETITIONER

The New York County District Attorney, on behalf of the People of the State of New York, seeks reversal of a judgment of the New York State Court of Appeals. By that judgment, the Court of Appeals, by a divided court (5-2), reversed a judgment of the New York State Supreme Court, Appellate Division, First Department, affirming respondent Paul Ira Ferber's conviction of Promoting a Sexual Performance by a Child (New York Penal Law §263.15).

Opinions Below

The opinion of the New York Court of Appeals (App. A, 1a-16a[1]) is reported at 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981). The Appellate Division's order affirming respondent's conviction without opinion (App. B, 17a-18a) is reported at 74 A.D.2d 558, 424 N.Y.S.2d 967 (1st Dept. 1980). The opinion of the trial judge denying respondent's motion to dismiss the indictment (App. C, 19a-28a) is reported at 96 Misc.2d 669, 409 N.Y.S.2d 632 (Sup. Ct., N.Y. Co., 1978).

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 12, 1981. The petition for a writ of certiorari was filed on July 11, 1981, and this Court granted the petition on November 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix I.

Statement of the Case

On March 2, 1978, respondent Paul Ira Ferber, the owner of a Manhattan bookstore specializing in pornography, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young

1. References to appendices A, B and C are to the appendices to the petition for a writ of certiorari. References to Appendices I and II are to the appendices to this brief.

boys masturbating. The first film shows a naked boy lying face down on a bed, rubbing against the bed. After a while, the boy turns over onto his back and masturbates twice to ejaculation. Then, lying on his side, he places a dildo between his buttocks as if to insert it into his anus.

The second film shows a naked young boy masturbating to ejaculation and inserting a dildo into his anus. The second film also includes scenes of other naked boys, including some no older than seven or eight years of age, jumping, sitting and reclining on a mattress. In addition, these boys are engaged in solo and mutual masturbation and in conduct suggesting oral-genital contact. At the end of the second film, the main child performer dresses very slowly, then picks up what appears to be United States currency and holds it toward the camera.

Respondent was indicted on two counts each of Promoting an Obscene Sexual Performance by a Child (New York Penal Law §263.10) and Promoting a Sexual Performance by a Child (New York Penal Law §263.15). He moved to dismiss the indictment, arguing that Section 263.15 is overbroad in that it prohibits promotion of non-obscene materials, which are protected by the First Amendment. Respondent's motion to dismiss the indictment was denied in an opinion by Justice Irving Lang of the New York State Supreme Court, 96 Misc.2d 669, 409 N.Y.S.2d 632 (App. C). After the trial, at which the two films were exhibited to the jury, respondent was acquitted of the two counts of Promoting an Obscene Sexual Performance by a Child (Penal Law §263.10) but found guilty of the two counts of Promoting a Sexual Performance by a Child,

which did not require proof that the films were obscene (Penal Law §263.15).

Respondent's conviction was affirmed without opinion by the Appellate Division of the New York State Supreme Court. 74 A.D.2d 558, 424 N.Y.S.2d 967 (App. B).

On appeal to the New York Court of Appeals, respondent again argued that Section 263.15 is overbroad because it makes criminal the promotion of material which is not obscene. Holding that Section 263.15 violated the First Amendment, the New York Court of Appeals reversed and dismissed the indictment.

The Judgment Below

At the outset of its per curiam opinion, the New York Court of Appeals stated that, although it would ordinarily "interpret a statute so as to avoid constitutional infirmities, if at all possible" (App. A, at 3a), it could not read Section 263.15 in a limited way. More specifically, the court found it impossible "to save Section 263.15 by limiting its application to those who promote obscene performances" (App. A, at 3a). That limiting construction was not possible because another section, Section 263.10, makes it a crime to promote an obscene sexual performance by a child; thus, there was no doubt that the New York Legislature intended that Section 263.15 encompass sexual conduct by children in performances which are not obscene (App. A, at 3a-4a). This refusal to consider any other limiting construction makes it clear that the New York Court of Appeals, accepting the argument of respondent (*see* Appellant's Brief to the Court of Appeals, pp. 15-26), reached the conclusion

that the First Amendment precludes a state from prohibiting the promotion of a performance in which a child engages in sexual conduct unless the performance is obscene.

The court went on to hold, in addition, that even if the state's interest in protecting children from sexual abuse through exploitation by commercial interests were sufficiently compelling to justify a prohibition on the dissemination of performances which are not obscene, the New York statute would still be inconsistent with the First Amendment. This was so because the legislation is "strikingly underinclusive," in that it prohibits promotion of sexual performances, but does not bar the promotion of films, books or plays the production of which involves a child's performance of a dangerous stunt or his participation in any of the other numerous activities which the Legislature has determined are dangerous to the health or well-being of child employees or employees generally (App. A, at 5a-6a). According to the court, "the statute discriminates against films and other visual portrayals of nonobscene adolescent sex solely on the basis of their content" (App. A, at 6a), and cannot be sustained because no justification is shown for protecting children from sexual abuse and not all other possible dangers (*id.*).

Combining the two rationales for its decision at the conclusion of the majority opinion, the court summed up its holding:

> We merely hold that those who present plays, films and books portraying adolescents cannot be singled out for punishment simply because they deal with adolescent sex in a realistic but nonobscene manner (App. A, at 6a).

The court also mentioned that there was a question whether, to deter those who might exploit children in New York, the state has the power to punish the promotion in New York of materials which were produced elsewhere. The court, however, did not decide this question (App. A, at 5a).

In dissent, Judge Jasen, joined by Judge Gabrielli, emphasized that the Legislature was primarily concerned not with the morality of those who view the child's sexual performance, but with the effect of the sexual conduct on the children who were made to engage in that conduct (App. A, at 8a-9a). Judge Jasen pointed out that Section 263.15 does not purport to limit what may be said or what ideas may be expressed about childhood sexuality, but limits only the manner in which such ideas may be expressed (App. A, at 11a). In the dissenters' view, as well as that of the trial judge and apparently all five justices of the Appellate Division, this limited restriction on expression is justified by the state's compelling interest in preventing the sexual abuse and exploitation of the children (App. A, at 11a-14a). To the majority's conclusion that the statute is underinclusive, the dissenters replied that the Legislature could prohibit dissemination of only those products involving the most serious danger to children. According to the dissenters, the distinction drawn by the Legislature is justified by the unique danger of severe psychological and emotional injury to children who are exploited by being made to engage in sexual conduct to supply the market for child pornography (App. A, at 15a).

Summary of Argument

The production and dissemination of films, magazines, and other materials showing children as young as three years old engaged in virtually every type of sexual activity has become a major industry. Children who are forced by adults to perform sexual acts during the production of child pornography, like children subjected to any other form of sexual abuse, suffer profound physical and, especially, psychological injury, the full extent of which has only recently become appreciated by the scientific and medical professions.

New York has made it a crime to abuse children by forcing them to perform sexually. To discourage the sexual abuse of children, New York has, like nineteen of her sister states, also prohibited the dissemination of the materials which depict sexual conduct of children, regardless of whether the materials are obscene in the legal sense. The New York Court of Appeals in this case struck down that prohibition, holding that unless the materials are obscene the dissemination of child pornography is absolutely protected by the First Amendment.

The court's overly simplistic First Amendment analysis was faulty. Speech may be regulated to promote a compelling state interest, if there is no effective and less restrictive alternative. New York's statutory ban on the dissemination of materials depicting the sexual abuse of children was designed to combat a serious threat to the welfare of the state's children by eliminating the economic incentive for the sexual abuse, and thus beyond question pro-

motes a compelling state interest. Further, there is no effective alternative to the ban on dissemination. A direct prohibition on the actual abuse of children will not, by itself, prevent the sexual exploitation of children. Nor would children be adequately protected if the dissemination of obscene materials alone were prohibited. The obstacles to successful prosecution inherent in the legal definition of obscenity are so great that obscenity convictions are extremely difficult to obtain. A ban directed only at the sale of obscene materials thus would not effectively deter traffic in materials depicting sexual conduct of children, just as traditional obscenity statutes have failed to deter traffic in other types of obscene material. Further, even if obscene works could be forced out of the market place, the protection for children would still be inadequate; a sexually abused child suffers the same trauma regardless of whether the work which contains the depiction of his sexual performance is legally obscene.

The New York Court of Appeals, in an alternative holding, also determined that the ban on dissemination was unconstitutionally "underinclusive" because the only danger to child performers addressed by the statute is the danger of sexual abuse. Again, however, the court's analysis was faulty; nothing in the First Amendment prevents a state from seeking to eliminate a single pressing threat to child performers while leaving other types of problems, if any, to different legislation. Finally, there is no merit to the court's suggestion that, because materials made outside New York fall within the scope of its ban on dissemination, the statute might arguably be beyond the police power of the state.

POINT

New York's prohibition of the dissemination of non-obscene materials showing the sexual conduct of children furthers the State's compelling interest in protecting children from sexual abuse, in a manner no more restrictive of speech than is necessary to further that interest.

Introduction

In the late 1970's, it was brought to the attention of the American public that pornographers were exploiting children by making them perform sexual acts before cameras and live audiences. To protect children from this abuse, the New York Legislature enacted Article 263 of the Penal Law.

Section 263.05 prohibits employing, inducing, authorizing or permitting children under the age of sixteen to engage in sexual conduct during a performance. Believing that this direct ban on use would not effectively prevent the abuse of children, the Legislature also enacted Section 263.15. That section prohibits the knowing dissemination of materials, both obscene and non-obscene, showing children engaged in sexual conduct.[2] Finally, the Legislature, concerned that there might be a successful challenge to a ban on the dissemination of non-obscene materials, enacted Section 263.10. That section bans the knowing dissemina-

2. New York Penal Law Section 263.15 makes it a crime knowingly to "promote" materials depicting sexual conduct of children. " 'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same." N.Y. Penal Law §263.00(5). For simplicity, throughout this brief we characterize Section 263.15 as a dissemination statute.

tion only of obscene materials showing the sexual conduct of children under the age of sixteen.

The Legislature's concern was well founded. In this case, the New York Court of Appeals held that only the dissemination of obscene materials can be prohibited; thus, Section 263.15 was declared unconstitutional because it prohibits the dissemination of non-obscene materials as well.

The Court of Appeals was mistaken. Section 263.15, the broad dissemination statute, is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production. Accordingly, to demonstrate the constitutionality of the entire statutory scheme, it is necessary to examine the ban on the use of children in producing the sexual performances. Further examination will demonstrate that the prohibition in Section 263.15 of the dissemination of both obscene and non-obscene materials is constitutional: it is the least restrictive means of furthering the compelling state interest in protecting children from sexual abuse.

The Court of Appeals, in the alternative, held that the dissemination statute was "underinclusive" because the Legislature did not prohibit the dissemination of materials showing child performers engaged in other, non-sexual, dangerous activity. Analysis of this holding reveals that the dissemination statute is not unconstitutionally underinclusive. The Legislature had valid reasons for dealing with the problems of sexual abuse, while leaving to existing statutes or future legislation, if necessary, the problem of other dangers to performing children.

Finally, the court below questioned, but did not decide, whether the State of New York can prohibit the dissemination in New York of materials depicting the sexual abuse of children, if that abuse did not occur in New York. Examination of this question reveals that the State of New York has more than a sufficient interest in banning the dissemination of such materials in New York.

(A) The prohibition against using children by having them engage in sexual conduct before a camera or live audience is fully justified by the compelling state interest in protecting children.

This Court has recognized that a state has a compelling, indeed a transcendent, interest in protecting its children. *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968), *quoting with approval People* v. *Kahan*, 15 N.Y. 2d 311, 312, 206 N.E. 2d 333, 334, 258 N.Y.S. 2d 391, 392 (1965) (Fuld, J., concurring); *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944). As persuasively argued by Judge Jasen in dissent below (App. A, at 10a), Section 263.05 is directed at conduct of a kind which the State is entitled to prohibit, namely, the actual sexual abuse which is involved in using a child in a sexual performance. *See United States* v. *O'Brien*, 391 U.S. 367, 376-77 (1968); *see also People* v. *Folk*, 109 Misc.2d 738, 740-42, 440 N.Y.S. 2d 984, 986-87 (Sup. Ct., N.Y. Co., 1981). Moreover, even if characterized as a direct regulation of speech, Section 263.05 is constitutional, because it furthers a transcendent state interest. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Miller* v. *California*, 413 U.S. 15, 18-19 (1973).

Whether construed as a regulation of conduct or of speech, or both, the statute is constitutional only if it

restricts speech no more than is necessary to achieve the state interest. *United States* v. *O'Brien*, 391 U.S. at 377; *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786. Section 263.05 is not more restrictive than necessary: there is no less restrictive way to protect children from sexual abuse than by directly prohibiting that abuse. Indeed, respondent conceded below that Section 263.05 does not unduly restrict free speech. Appellant's Brief to the New York Court of Appeals, at 9-11. At the same time, there is no doubt that the Legislature enacted the statute in order to protect children from sexual exploitation and that the Legislature's concern was well founded.

That Penal Law Article 263 was enacted to protect children is plain from the legislative findings accompanying the enactment:

> [T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances. . . . Laws of New York, 1977, ch. 910, §1.[3]

3. In addition, the Legislature found

> the sale of these movies, magazines and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of children and the promoters of this filth by vigorously applying the sanctions contained in this act. Laws of New York, 1977, ch. 910, §1.

This statement is similar to one of the reasons for prohibiting obscenity. *See Miller* v. *California*, 413 U.S. at 24; *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 57-62 (1973). Since Article 263 also contains a ban on the dissemination of obscene materials and since child pornography has some of the attributes of obscenity, it is not surprising that this rationale is also advanced as a basis for the legislation. Nevertheless, the primary rationale, as expressed first by the Legislature, is the protection of children from sexual exploitation.

Based upon similar findings and after concluding that existing legislation did not effectively deal with this kind of abuse, forty-seven other legislatures, and the Congress, enacted legislation to combat the sexual abuse of children in the production of pornography.[4]

---

4. In addition to New York, nineteen states have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. §13-3553; Colo. Rev. Stat. §18-6-403(3)(b); Del. Code Ann. tit. 11, §§1108, 1109; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§531.320, 531.340-531.360; La. Rev. Stat. Ann. §14:81.1(A)(3); Me. Rev. Stat. Ann. tit. 17, §2923(1); Mass. Ann. Laws ch. 272, §29A; Mich. Comp Laws Ann. §750.145c(3); Miss. Code Ann. §97-5-33(4); Mont. Rev. Codes Ann. §45-5-625; N.J. Stat. Ann. §2C:24-4(b)(5); Okla. Stat. Ann. tit. 21, §1021.2; Pa. Cons. Stat. Ann. §6312(c); R.I. Gen. Laws §11-9-1.1; S.D. Codified Laws Ann. §22-22-24; Tex. Penal Code Ann. tit. 9, §43.25(e) (Vernon); W. Va. Code §61-8C-3; Wis. Stat. Ann. §940.203(4) (West). The Hawaii statute, Hawaii Rev. Stat. §707-751, has been held unconstitutional by a Hawaii trial court on the ground that it prohibits material which is not obscene. *State* v. *Shingaki*, Hawaii Circuit Court, First Circuit, Cr. No. 54385, April 27, 1981, slip opinion at 4. The state's appeal from this decision is currently pending before the Hawaii Supreme Court. Petitioner has found no other case construing any of these statutes.

Eleven states prohibit the dissemination of such material only if it is obscene. Ala. Code §13-7-231, 13-7-232; Ark. Stat. Ann. §41-4201; Cal. Penal Code §311.2(b) (Deering); Ill. Ann. Stat. ch. 38, §11-20a (b)(1) (Smith-Hurd); Ind. Code Ann. §35-30-10.1-2; Minn. Stat. Ann. §617.246(3) and (4); Neb. Rev. Stat. §28-1463(2); N.H. Rev. Stat. Ann. §650:2(II); Ohio Rev. Code Ann. §2907.321(A) (Anderson); Ore. Rev. Stat. §163.485; Wash. Rev. Code Ann. §9.68A.030. The federal statute also prohibits dissemination only if the material is obscene. 18 U.S.C. §2252(a). Three states prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. Ann. §53a-196b (West); Fla. Stat. Ann. §847.014(2)(b) (West); Va. Code §18.2-374.1(B)(4) and (5). Fourteen states prohibit only the use of minors in the production of the material. Alaska Stat. §11.41.455; Ga. Code Ann. §26-9943(a); Iowa Code Ann. §728.12 (West); Kan. Stat. Ann. §21-3516; Md. Crim. Law Code Ann. §419A; Mo. Ann. Stat. §568.060(1)(b); Nev. Rev. Stat. §200.509; N.M. Stat. Ann. §30-6-1; N.C. Gen. Stat. §14-190.6; N.D. Cent. Code Ann. §12.1-27.1-03(2); S.C. Code §16-15-380; Tenn. Code Ann. §39-1020; Utah Code Ann. §76-10-1206.5; Wyo. Stat. Ann. §14-3-102(a)(v)(E). *See generally* Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 556 (1981).

The exploitation of children by making them perform sexual acts before a camera or a live audience is not a figment of the Legislature's imagination. Child pornography is a nationwide industry grossing more than 200 million dollars a year. That industry has produced the films in this case, which depict young boys masturbating to ejaculation and also depict a group of boys on a mattress, some no older than eight, fondling each other's genitals and simulating fellatio. These films are almost mild compared to other material readily available in the marketplace: young boys and girls, some no older than three years of age, are depicted engaged in intercourse, fellatio, cunnilingus, and sodomy with other children and adults and even in sex with animals.[5]

Surely, the New York Legislature could find that making children under the age of sixteen engage in sexual conduct[6] as subjects in child pornography constitutes sexual abuse and is physically, psychologically and emotionally

5. The child pornography industry is examined in Appendix II *infra*.

6. New York Penal Law Section 263.00(3) defines sexual conduct as meaning actual or simulated intercourse, deviate sexual intercourse (sodomy), masturbation, bestiality, sadomasochistic abuse (flagellation or torture) or lewd exhibition of the genitals. Simulated sexual conduct is defined as the explicit depiction of the above conduct which creates the appearance of that conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks. New York Penal Law §263.00(6). By defining simulated sexual conduct to include the explicit depiction of the forbidden acts, accompanied by exposure of the breasts, genitals or buttocks, the Legislature intended to prohibit conduct which is clearly deleterious. In addition, it is sometimes difficult, if not impossible, to determine whether the depicted sexual act is real or simulated. For that reason, the State is justified in prohibiting simulated conduct of this kind, especially since there are alternatives to using a partly or wholly naked child in a pose which explicitly depicts sexual conduct. *See* pp. 24-25 *infra*.

harmful to the children involved. Significantly, such a finding need not be based upon accepted scientific fact; it is sufficient that the harmfulness of using children in pornography has not been scientifically disproved. *See Ginsberg* v. *New York*, 390 U.S. at 641. Still, despite the recency of child pornography as a major social issue, there is ample scientific support for this conclusion (*see* Appendix II *infra*). Given that support, there is no doubt that the Legislature could determine that sexual use constitutes a danger to the children involved, and thus, prohibit such use.

(B) A statute banning the dissemination of material depicting the unlawful sexual use of a child is justified fully by the compelling state interest in protecting children and the absence of any less restrictive alternative.

If the sexual abuse of children in the production of films, photographs and live performances is evil and can be prohibited, it would seem to follow logically that the products of that evil can also be prohibited. However, according to respondent and the court below, once that sexual abuse becomes visually memorialized, *e.g.*, on film, in a photograph or on videotape, then any statutory prohibition on its dissemination is aimed at the content of speech. The analysis continues: a prohibition based on content is constitutional only if the material involved falls within those specific categories of speech which this Court has held may be prohibited. Obscenity is the only one of these categories applicable to material depicting the sexual conduct of children; hence, the argument simply concludes that dissemination of this material may be prohibited only if the material is obscene.

Like most simple answers to complex questions, this one is wrong. This Court has never held that merely because speech does not fit into one of the enumerated categories of unprotected speech, it is absolutely protected under the First Amendment. Indeed, the Court has held the exact opposite: The right of free speech is not absolute. Speech may be prohibited provided that the prohibition furthers a compelling state interest and is the least restrictive alternative to achieve that interest. *Schad* v. *Borough of Mount Ephraim*, —— U.S. ——, 101 S.Ct. 2176, 2182-84 (1981); *First National Bank of Boston* v. *Bellotti*, 435 U.S. at 786; *Schneider* v. *State*, 308 U.S. 147, 161-65 (1939). *See* Tribe, American Constitutional Law, pp. 581-83, 602-06 (1978).[7] Thus, regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech, prohibiting dissemination of those materials does not violate the First Amendment if the "compelling state interest-less restrictive alternative" standard is satisfied. The standard is satisfied in the case of the prohibition on the dissemination of materials depicting the sexual abuse of children.

It is beyond cavil that protecting children is a compelling state interest. *See, e.g., Ginsberg* v. *New York*, 390 U.S. at 649. Equally beyond argument is that inherent in

7. This Court seems evenly divided over whether the state may justify its regulation of non-obscene sexually oriented materials under a less rigorous standard. *Compare Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-71 (1976) (Stevens, J.) (plurality opinion), *with id.* at 73n.1 (Powell, J., concurring) and *id.* at 86 (Brennan, J., dissenting). However, it is unnecessary to resolve this question here, because a prohibition on the dissemination of materials showing the sexual conduct of children satisfies the "less restrictive alternative-compelling state interest" standard.

the production of materials depicting children engaged in sexual conduct is sexual abuse against those who are helpless to defend themselves. As we have shown (*see* pp. 9-13 *supra*), there can also be no doubt about the state's power to protect children from such abuse by directly prohibiting it. Surely, the undisputed governmental power to prevent the abuse by directly prohibiting it implies the power to prevent the abuse indirectly by "destroy[ing] the primary economic incentive for [its] commission." Tribe, *supra*, at 666 n.62. Prohibiting distribution of the product discourages distributors from selling it and thereby decreases the profits of the producers. A decrease in profits leads to less production, hence, less sexual abuse of children. The distributor serves as the

> vital link in the industry between the market and the production process. The economic incentives to produce are provided by the distributor's activities. Without these economic incentives, production of child pornography and the connected child abuse would be severely curtailed. . . . Note, *Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation*. 12 Mich. J.L. Reform 295, 313 (1979).

Prohibiting the distribution of child pornography as a means to prevent the sexual abuse of children in its production is no different in principle from prohibiting distribution of products manufactured by exploiting child labor. This Court has recognized the power of the state to prevent exploitation of child labor by prohibiting commerce in goods produced by that labor. *See United States* v. *Darby*, 312 U.S. 100, 116, 119, 125 (1941). Today's more pernicious form of exploitation of children calls for a similar approach. Indeed, if New York had merely enacted general

legislation prohibiting the sale of any item produced by sexually exploiting children, the *Darby* case would be persuasive authority for upholding that prohibition. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 193 (1946). Instead, New York and nineteen sister states,[8] faced with a problem involving only sexual performances, enacted narrower legislation addressed exclusively to the context in which the problem manifested itself. Given the compelling state interest in protecting children from sexual abuse, there is no reason to treat the specific statute differently from a more general one.

Of course, the most significant harm to be prevented by a ban on the distribution of materials depicting sexual conduct by children is the child abuse attendant to the production of these materials. Notably, however, prohibiting the distribution of these materials serves important interests even beyond eliminating the child abuse that occurs during production itself. For example, the materials showing children engaged in sexual conduct are sold to adults who use the materials to convince other children to engage in similar conduct. *See* Appendix II at 13a-14a *infra*. In addition, there is evidence suggesting a link between the sale of these materials and the commission of sex crimes against children. *See* Appendix II at 14a *infra*.

In sum, by prohibiting the dissemination of materials produced by sexually abusing children, the state furthers its compelling interest in protecting children. It remains only to consider whether there is a less restrictive effective alternative to achieve this important interest. There is none.

---

8. *See* statutes collected in note 4, *supra*.

Only two alternatives have been suggested. The first is a prohibition only of the actual sexual abuse and the second is a prohibition on the dissemination of obscene materials only. Both of these alternatives rely on one of the other two New York provisions enacted with Section 263.15. Neither is an effective alternative to the ban on dissemination of non-obscene as well as obscene materials.

The prosecution only of those who directly abuse children is not an effective alternative because those who produce the material, abusing the children in the process, generally do their work in secret. True, there has been limited success in ferreting out and prosecuting a few producers. *See* C. Linedecker, Children in Chains (1981). Nonetheless, as emphasized in the congressional hearings, virtually all of this material is produced in a way that defies detection, so that the only effective way to curtail production is to exclude the material from the market entirely.[9] As recognized by Professor Tribe:

---

9. In the words of Charles Rembar, commenting on proposed federal legislation which would bar the dissemination of non-obscene child pornography, "It hits expression only as a corollary, in my judgment a very necessary corollary. It is necessary because . . . the kind of action the bill aims at is not done in public places. It is an impossible prosecutorial job to try to get at the acts themselves." Sexual Exploitation of Children, Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children I), p. 34. *See also id.* at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology and specialist in child abuse and neglect), 69 (statement of Investigator Lloyd Martin, Sexually Exploited Child Unit, Los Angeles Police Department), 142 (statement of Assistant Attorney General John C. Keeney); Sexual Exploitation of Children, Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977) (hereinafter cited as Sexual Exploitation of Children II), pp. 118-19 (statement of Robin Lloyd), 254 (statement of Father Bruce Ritter,

(footnote continued on next page)

> Given the great difficulty of directly enforcing laws against the crimes being filmed (especially if faces are concealed), and given the lack of any economic incentive to commit such crimes apart from the market for films of their commission (contrast films of bank robberies, say), it seems insufficient to reply that government must pursue the less restrictive alternative of prosecuting the underlying crimes rather than prosecuting the filmmaker or indeed confiscating the film. Tribe, *supra*, p. 666 n.62.

In search of a less restrictive alternative, respondent argued, and the court below agreed (App. A, at 6a), that since all that was objectionable in materials showing children engaged in sex would fit within the definition of obscenity, the state's interest in protecting children could be fully protected by Penal Law Section 263.10, which bans the dissemination of obscene materials. To the contrary, it is simply unrealistic to believe that an obscenity requirement would discourage distributors from dealing in child pornography. This belief ignores the reality that the obscenity laws have failed to discourage the distribution of obscenity. *See* Project, *An Empirical Inquiry into the Effects of Miller* v. *California on the Control of Obscenity,*

Director, Covenant House, New York City), 272-73 (statement of Charles Rembar).

Even a senior editor for Playboy, who opposes a ban on dissemination, has seen the logic of this approach.

> Everyone agrees that the sexual abuse of minors can and should be prosecuted. The problem is that the traffic in the resulting pornography encourages such child abuse by making it profitable. And police claim they find it difficult to identify the actual producers or to trace down the abused children—let alone to get them to testify and have that testimony accepted in court. The obvious course is to shut down the market. Shea, *Kids in Pornography,* Playboy, vol. 24, no.8, p. 54 (1977).

52 N.Y.U.L. Rev. 810, 886-90 (1977) (hereinafter cited as *Project on Obscenity*). The deterrent value of the statutory ban on obscenity is effectively undercut by the difficulties in prosecuting obscenity cases successfully. The same difficulties in the prosecution of obscenity would be presented if a prosecution for disseminating materials depicting sexual conduct of children turned on proof of the obscenity of those materials.

To begin with, the concept of obscenity is complex, and its application to particular cases is a "matter of considerable delicacy," *United States* v. *Various Articles of Obscene Merchandise*, 600 F.2d 394, 402 (2d Cir. 1979), resting on often highly elusive criteria. For example, defense counsel have argued successfully that even though the materials at issue in a particular case are disgusting, they simply do not appeal to the prurient interest in sex of either heterosexuals or any sexually deviant group, or are not patently offensive by community standards. Indeed, in this very case, respondent was acquitted of selling obscene films in violation of Section 263.10. Defense counsel agreed that these films were disgusting and offensive and told the jurors that they could well find the films repulsive, but still he called for an acquittal on the ground that the prosecution failed to prove the films appealed to the prurient interest of the particular group identified by the prosecutor. Regardless of the reason for acquittal, this very case shows that the obscenity standard is easily manipulable, and that its deterrent effect is thus at best questionable.[10] *Project*

10. To demonstrate the point further, one need only cite the various photographs or films which explicitly show adults in various sexual acts and poses, but are nonetheless held to be not obscene. *See, e.g., People* v. *Stabile*, 58 Misc.2d 905, 296 N.Y.S.2d 815 (N.Y.C. Crim. Ct. 1969). Substituting children for adults in these photographs or films is hardly likely to lead to a finding of obscenity.

on Obscenity, supra, 52 N.Y.U.L. Rev. at 923. As seen from respondent's conviction on the dissemination count, Section 263.15 is not so easily avoided.

The deterrent effect of the ban on obscenity is also undermined by the requirement that the work in question must be examined as a whole. *See Miller* v. *California,* 413 U.S. at 24; N.Y. Penal Law §235.00(1)(c). Defense counsel may succeed in persuading a court or a jury that despite one or two or even a substantial number of scenes of a child engaged in sexual conduct, a work has serious value when considered as a whole. *See, e.g., People* v. *New Horizons, Inc.,* —— Colo. ——, 616 P.2d 106 (Colo. Sup. Ct. 1980); *Project on Obscenity, supra,* 52 N.Y.U.L. Rev. at 923. The requirement of examining the work as a whole could permit publications which have been found not obscene to present a "child of the month" in various sexual poses or acts. In addition, the "entire work" requirement would permit filmmakers to exploit children sexually and avoid prosecution by clothing that exploitation with the thinnest of story lines or other non-sexual material.

Moreover, even with so-called serious materials, the obscenity requirement of taking the work as a whole does not protect the child who is abused sexually in the production of that work. This is the reason why the Legislature chose to prohibit the dissemination of both non-obscene and obscene materials depicting children engaged in sexual conduct. As pointed out by a sponsor of New York's statute, "It is irrelevant to the child whether or not the material is obscene or has a literary, artistic, political or social value." Assemblyman Howard L. Lasher, Memorandum in Support of Assembly Bill A. 3587-B, p. 2 (*see* App. C, at 27a).

Given the statutory purpose of protecting children from exploitation in the production of materials which can only be produced by making the children engage in sexual conduct, it would have been incongruous for the Legislature to prohibit the dissemination of obscene materials alone. The elements of obscenity—prurient appeal, patent offensiveness and lack of serious value—all pertain to the content of the material and not to the circumstances of its production. *See* Pope, *Child Pornography: A New Role for the Obscenity Doctrine,* 1978 Ill. L. F. 711, 745. It would be equally inconsistent with that statutory purpose to permit knowing purveyors of child pornography to defend against a charge of distributing a child's sexual performance, *e.g.*, a film or photograph, by showing that the performance at issue is not obscene, however sexually exploitative it might be. Thus, the obscenity statute does not present a less restrictive alternative to the prohibition of dissemination of both obscene and non-obscene materials. Indeed, it presents no alternative at all.

In a further attempt to find a less restrictive alternative, it might be argued that, given that most child pornography is devoted entirely or substantially to depicting children engaged in sexual conduct, the state may ban the distribution only of those materials which are substantially devoted to showing the sexual conduct of children. This kind of prohibition would not turn on elusive community standards, prurient interest, the nature of the work as a whole or the value of the material. A fact finder would merely have to look at the material itself, not its theme, and decide whether depictions of sexual conduct are a substantial part of the whole.

The difficulty with such a standard is that it would exempt works which were produced by sexually abusing children, if they are not substantially devoted to showing that sexual abuse. Children would still be abused in production of such material. Further, such a standard would encourage pornographers to clothe their sexual use of children with other materials, so that the sex was not substantial but nonetheless gave the buyer what he really wanted.

The only reason to prefer a "substantially devoted" standard to a simple ban on the dissemination of all materials depicting sexual conduct of children is the concern that a simple ban would include a few worthwhile works, and thus deprive society of works of artistic, literary or philosophical value. This concern is unrealistic. It is unrealistic because it is unlikely that producers of worthwhile works would find it necessary to require a child to engage in sexual conduct in the production of those works. If it is necessary to express an idea by portraying the sexual conduct of children, there are lawful techniques for doing so, short of having a child perform or simulate sexual acts. A brief examination shows the effectiveness of those techniques.

Notably, the statute, in defining sexual conduct, does not include simple nudity, although it does prohibit lewd exhibition of the genitals. Nudity is prohibited only when it is accompanied by simulated sexual conduct, that is, the explicit depiction of the prohibited acts. N.Y. Penal Law §263.00 (3) & (6). In not prohibiting simple nudity, the statute allows producers ample room to express an idea, convey a message or tell a story about the sexual conduct of children.

Moreover, the statute has no application when actors or actresses or models over sixteen years of age are used to portray children of lesser years, and persons over sixteen are generally available. Thus, although the producers of the recent Broadway production of *Lolita* auditioned seventy-five girls under fourteen for the title role, they finally chose a twenty-four-year-old actress to play the part. Goldstein, *Kids Do the Darndest Things, The Village Voice,* September 24-30, 1980, p. 36 col. 1; *The New York Daily News,* December 12, 1980, p. 9 col. 2. In the production of motion pictures as well, the availability of doubles, the absence of a prohibition on mere nudity and the use of sophisticated cutting techniques leave ample effective means of portraying sexual conduct without having a child under sixteen engage in a sexual act. For example, a double was used to film Brooke Shields' nude scenes in *The Blue Lagoon* and *Endless Love. The New York Times,* June 15, 1980, Section 2, p. 25 col. 2; *Brooke and Teri,* Us, January 19, 1982, p. 69. In short, the producer has sufficient lawful means to tell his audience about the sexual conduct of a child without subjecting a child to sexual abuse, and it is unlikely that the public will be deprived of anything of value because the State of New York has prohibited the dissemination of material produced by sexually abusing children. The desire of those who insist that they want the "real thing" must be subordinated to the state's compelling interest in protecting children.

The court below concluded that it could not give Section 263.15 a limiting construction because that section clearly and unequivocally prohibited the dissemination of non-obscene materials, and in doing so, was inconsistent

with the First Amendment. As demonstrated above, the court was wrong in holding that New York could not prohibit dissemination of non-obscene materials produced by making children engage in sexual conduct. The New York ban on dissemination of such materials has a wide, but nonetheless legitimate, sweep. Of course, it is possible to imagine situations in which protected conduct will fall within the scope of the statute. To take an instance cited by the court below (App. A, at 5a) in the unlikely event that a person would ever be prosecuted for showing "a filmed report of New Guinea fertility rites," that person could interpose a defense based on the unconstitutionality of the statute as applied. Given the legitimate breadth of the statute, these limited situations can be dealt with on a case by case basis, without resort to the drastic remedy of declaring the statute unconstitutional on its face. *See Broadrick* v. *Oklahoma*, 413 U.S. 601, 614-17 (1973).

Despite the statute's broad legitimate sweep, it is possible that in certain defined circumstances the dissemination of non-obscene materials showing children engaged in sexual conduct is protected. In that event, the case should be remanded to the New York Court of Appeals to determine whether Section 263.15 can be construed so as not to encompass dissemination in those circumstances. *See Time* v *Hill*, 385 U.S. 374, 377 (1967). To afford the Court of Appeals an opportunity to construe the statute is particularly judicious here, because that court, having concluded that the state could not regulate non-obscene materials, did not even attempt to render a limiting construction.

(C) Section 263.15 is not underinclusive because there was good reason to prohibit the dissemination of materials depicting the sexual abuse of children without also prohibiting dissemination of materials depicting other conduct harmful to children.

The New York Court of Appeals held that even if the Legislature were empowered to prohibit the dissemination of materials whose production is harmful to children, Section 263.15 is nevertheless unconstitutionally "underinclusive" because it prohibits dissemination only of materials which show children engaged in sexual conduct, and not of those which depict children engaged in dangerous stunts or other activities which the Legislature has found dangerous to their health. The court found this discrimination unjustified by anything more than "special legislative distaste" for portrayals of children engaged in sexual conduct (App. A, at 5a- 6a).

In reaching this conclusion, the court below relied solely on *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), but that case is inapposite. In *Erznoznik*, a Jacksonville city ordinance made it unlawful for a drive-in theater to exhibit movies containing nude scenes if such movies could be seen from a public place. During oral argument, counsel for the city argued that the purpose of the ordinance was to permit the smooth flow of traffic. In finding the ordinance underinclusive, this Court pointed out that it singled out one form of protected speech (movies with nudity) but failed to regulate other protected speech (other movies, *e.g.*, those containing violence) which created the same danger to traffic. *Id.* at 214-15. Thus, it appeared that the ordinance was designed to censor content rather than facilitate the flow of traffic.

In this case, there has been no attempt to censor expression because of its message, idea, subject matter or point of view. Rather, prohibiting the dissemination of materials depicting sexual abuse but not the dissemination of materials showing children engaged in other types of harmful conduct is justified by special concerns about the sexual exploitation of children. As pointed out by Judge Jasen, dissenting below, the real danger of psychological and emotional injury resulting from the production of materials which exploit children sexually constitutes good reason for a prohibition aimed specifically at those materials (App. A, at 15a). Certainly, the New York Legislature could reasonably conclude that other types of harm to children which might result from their participation in illegal performances, *e.g.*, injury from dangerous stunts, are not threats of the same type or magnitude as those involved in sexual abuse.

Moreover, there is no evidence to suggest that dangerous stunts or other kinds of dangerous employment are not effectively dealt with by existing direct prohibitions on the use of children in such circumstances. *See, e.g.*, New York Education Law §3231-a (child under sixteen may not be employed as, *inter alia*, a rope or wire walker, gymnast, rider upon a horse or other animal, acrobat or "in any practice or exhibition or place dangerous or injurious to the life, limb, health or morals of such child"); New York Labor Law §133 (child under sixteen may not be employed in house painting, manufacturing, operation of grinding, cutting or slicing machines or elevators, logging, mining, *etc.*). By contrast, there are ample reasons supporting the conclusion that the sexual abuse of children in the production of materials showing them engaged in sexual conduct

cannot be stopped without prohibiting dissemination of those materials. *See* pp. 17-18, *supra*.

Neither *Erznoznik* nor any other decision of this Court stands for the proposition that the Legislature cannot take action against a particular danger which is a greater threat than other arguably similar dangers which the Legislature has decided not to address. Accordingly, the Legislature was justified in prohibiting the traffic in child pornography, without at the same time banning the dissemination of other materials whose production may be harmful to children.

(D) Prohibiting the dissemination of materials depicting sexual conduct by children regardless of where that conduct occurs is well within the state's police power.

Section 263.15 prohibits dissemination of materials in New York regardless of whether the sexual abuse depicted in the film occurred in the state. The court below, in a single sentence and without any citation whatever, questioned whether New York State had the power to prohibit the dissemination of material depicting a sexual performance by a child if that performance did not take place in New York. Unfortunately, after asking the question, the court did not answer it.[11]

---

11. Even though respondent did not raise the question and the court below did not decide it, an argument based upon the absence of police power could be made as an alternative ground for affirmance. *See United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977). Given the possibility that time will not permit a reply brief, we have chosen to answer that argument now. Moreover, many of the reasons why this legislation is a proper exercise of the police power likewise demonstrate why a ban on the dissemination only of material which depicts the sexual conduct of New York children would not be an effective alternative to a ban on the dissemination of materials which depict such conduct regardless of where it occurs.

Above, we have shown that a state can, consistently with the First Amendment, prohibit the dissemination of both non-obscene and obscene materials depicting sexual conduct of children. New York can enact such a prohibition pursuant to its police powers, provided that the prohibited conduct has a nexus to the state and that the Legislature could rationally conclude that such a prohibition would further the welfare of the citizens of New York. *See Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423-424 (1951); *Nebbia* v. *New York*, 291 U.S. 502, 537-538 (1934). There is no doubt that the prohibition on the dissemination of child pornography in New York, regardless of the place of origin of the pornography, satisfies this standard.

The forbidden conduct, *i.e.*, dissemination, of course has a direct relationship with New York: it occurs in that state. Equally manifest is that the prohibition on dissemination of materials depicting sexual conduct by children, regardless of the materials' place of origin, protects New York children. It is often impossible to determine where pornographic material is produced. The products in the market generally do not identify the producer, and the chain of distribution is impossible to trace. In this regard, it is well known that domestic producers ship material produced in the United States to associates in foreign countries, who then process the material and return it to the United States.[12] In other instances, order forms sent to foreign outlets have been transferred thereafter to do-

12. King, *Chicago Jury to Probe Pornography and Prostitution Involving Boys, New York Times*, May 23, 1977, p. 19 col. 2; Sneed, Bliss, Moseley, *et al., Child Pornography: Sickness for Sale*, series of articles in *Chicago Tribune*, reprinted in Sexual Exploitation of Children I, *supra* note 9 at 430.

mestic producers or distributors, who fill the orders.[13] In either case, the purpose is to make it impossible to determine where the material was produced. Thus, the Legislature decided that prohibiting only the dissemination of materials produced in New York would be ineffective, and would not adequately protect New York children.

Moreover, if the ban extended only to materials produced in New York, the sale in New York of materials produced elsewhere could still flourish. The substantial market for child pornography in New York would encourage adults desiring to "get in on the action" to produce photographs or films here or to take New York children elsewhere for such production. If that market is reduced and the profits decreased through a complete ban on dissemination, then the threat to New York children is reduced.

Significantly, the prohibition against dissemination in New York of child pornography produced elsewhere, and the similar prohibitions of nineteen sister states, interlock to reinforce each state's ban on the sexual abuse of its own children by reducing the available market for the product of the abuse. State child labor laws are based on a similar idea. *See, e.g.,* N. Y. General Business Law §69-a. If this Court holds that a state constitutionally may prohibit dissemination, then it is possible that most, if not all, states as well as the Congress would enact such prohibitions. Then the bans on dissemination will even more effectively

13. Sexual Exploitation of Children: A Report to the Illinois General Assembly, p. 176 (1977); Sexual Exploitation of Children II, *supra* note 9 at 112-13 (statement of Robin Lloyd); Report to the Attorney General on Child Pornography in California, p. 6 (1977); Linedecker, Children in Chains, p. 224 (1977).

reinforce each state's prohibition on the sexual abuse of its children in the production of these materials.

Finally, even assuming that the Legislature sought to protect the welfare of children outside New York, that the question of the Legislature's power to do so was ever raised is somewhat surprising in light of the decision of the court below in *Nettleton Co.* v. *Diamond*, 27 N.Y. 2d 182, 264 N.E. 2d 118, 315 N.Y.S. 2d 625 (1970), *app. dism'd for want of a substantial federal question, sub nom. Reptile Products Assn., Inc.* v. *Diamond*, 401 U.S. 969 (1971). In that case, the court upheld a statute prohibiting the sale of products made from the skins of certain endangered species, including many species not indigenous to New York. According to the court, "the wildlife of the world is a vital asset to the people of this state," and it was not for the judiciary to substitute its judgment for that of the Legislature, which had concluded that by "eliminating the market for their species in New York State, the potential for their continued existence will be strengthened." 27 N.Y. 2d at 193, 264 N.E. 2d at 124, 315 N.Y.S. 2d at 633. Surely, the New York Legislature was entitled to find that children, regardless of where they live, deserve similar protection.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

ROBERT M. MORGENTHAU
District Attorney
New York County
Attorney for Petitioner

ROBERT M. PITLER
MARK DWYER
DONALD J. SIEWERT
Assistant District Attorneys
Of Counsel

January 15, 1982